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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 688

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY McCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. McCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE TO MOTION TO DISMISS

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SUBJECT INDEX

	PAGE
Delineation of the Issues	1
Issues Relating to Dismissal	5
Time of Appeal	5
Substance of Decree	6

AUTHORITIES CITED

CONSTITUTIONAL PROVISIONS:

Oklahoma Constitution, Art. V, Sec. 9(a) 2, 3

STATUTES:

Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. Sec. 1652 2

Act of June 24, 1949, c. 646, 62 Stat. 961, 28 U.S.C. Sec. 2101(a) 5

CASES:

Baker v. Carr, 369 U.S. 186 8

Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 7

Copeland v. Bennett, Tex. Civ. App., 243 S.W.2d 264 8

Electric Steel Foundry v. Huntley (C.C. 9th), 32 F.2d 892 8

Feinberg v. Doe, 14 Cal.2d 24, 94 P.2d 640 7

Gillis v. State of California, 293 U.S. 62 2

Government & Civic Emp. Org. Com. CIO v. Windsor, 353 U.S. 364 ..... 2, 4, 5

INDEX CONTINUED

	PAGE
Harrison v. N.A.A.C.P., 360 U.S. 167	2, 4, 5
Jones v. Freeman, 193 Okla. 554, 146 P.2d 564	2, 4
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25	2
National Fire Ins. Co. v. Thompson, 281 U.S. 331	3
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496	2, 4
Southern Pac. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498	7
United States v. Crescent Amusement Co., 323 U.S. 173	6

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RESPONSE TO MOTION TO DISMISS

DELINEATION OF THE ISSUES

It is noteworthy that the motion filed herein is solely one to dismiss, rather than a Motion to Affirm or Dismiss as permissible under Rule 16. Obviously, this is an effort by appellees to divert the Court's attention from the inevitable

conclusion of reversible error should the Court adhere to its prior decisions pertinent to the action of the 3-judge Court.

For the 3-judge Court flagrantly ignored the repeated injunctions of this Court to inferior Federal Courts to adhere to the so-called "doctrine of abstention," and, where construction of State law is necessarily involved in the litigation, to abstain from any construction of State law pending an adjudication in the State Courts.[1]

Moreover, an examination of the Decree of the 3-judge Court in relation to the number of Senators required to constitute the State Senate,[2] the 3-judge Court (as presented by the Fifth Question on Appeal[3]) without warrant of the Oklahoma Constitution as construed by the Oklahoma Supreme Court in the very decision cited,[4] *and in direct conflict with that decision* as to the requirements of Oklahoma Constitution, Article V, Section 9(a),[5] deliberately violated the "Rules of Decision Act"[6] by seeking—in effect—to write a new Constitution for Oklahoma in this particular. In so doing, the 3-judge Court not merely exceeded its *jurisdiction*, but its *judicial power* as well.[7]

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[1] *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-178 (*id.*, No. 5, Oct. Term 1962, Opinion January 14, 1963); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-501; *Government & Civic Emp. Org. Com. CIO* v. *Windsor*, 353 U.S. 364, 366.

[2] Jurisdictional Statement, Appendix V, p. xliii.

[3] *id.*, p. 13.

[4] *Jones* v. *Freeman*, 193 Okla. 554, 564, 146 P.2d 564.

[5] Jurisdictional Statement, Appendix VII, p. lvi.

[6] Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. § 1652.

[7] *Gillis* v. *State of California*, 293 U.S. 62, 66; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25.

At the time that the appellants intervened in the litigation, the law of Oklahoma as declared in the *Jones* v. *Freeman* decision, *supra*, required that the membership of the State Senate presently should consist of more than 44 Senators, by reason of the "except" clause in Section 9(a), Article 5, of the Oklahoma Constitution, *supra*, if that law should be valid under the Constitution of the United States. At the time of intervention, therefore, the issues did not encompass any construction or declaration of the law of Oklahoma, by pleadings or otherwise; and no reason existed for objecting to the determination, by a Federal Court, of the purely Federal questions affecting the validity of that law or compliance or non-compliance therewith. It was not until the Decree of August 3 was entered, in effect overruling the declaration of the law of Oklahoma as announced by its highest Court and, by *construction* alone striking from Section 9(a) the "except" clause which the Oklahoma Court decision had determined to be a part of the section, and restricting the membership of the State Senate to 44 members, that the issue of the law of Oklahoma was introduced into the case. Then, for the first time, the considerations abovementioned became pertinent, injected into the litigation by the 3-judge Court itself, but simultaneously bringing into operation both the limitation upon its judicial power under the Rules of Decision Act and its corollary, the doctrine of abstention.

Cumulatively, it is not inappropriate to call to the notice of the Court[8] that, contemporaneously with the filing

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[8] *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331.

of this Response, appellants have caused to be docketed another appeal from a subsequent injunction issued by the 3-judge Court in this same litigation. The record on that appeal will disclose that 30 State Senators (including the majority of the State Senate who are appellants here) sought to resolve the confusion engendered by the decree here appealed, in its inexplicable citation and novel "interpretation" of the *Jones* v. *Freeman*[9] decision. They commenced an action in the State Supreme Court, by bill *quia timet*, for a declaration instructing them as to the extent of their powers under the State Constitution in the enactment of reapportionment legislation, *i.e.*, whether they were authorized, as State officials, to pass such legislation as the 3-judge Court had ordered, and if so, the extent of that authority not in violation of Federal Constitution or, if it should be necessary to submit constitutional amendments, should the present provisions be so irreconcilable with the Federal Constitution as to preclude compliance without contravention of the latter.[10]

This procedure was deemed to accord with the decisions of this Court in such situations.[11] *But, thereupon, the 3-judge Court enjoined the prosecution of that action in the*

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[9] See note 4, p. 2, this Response.

[10] Whether or not the Oklahoma Legislature has been culpably remiss in not sooner reapportioning itself is not necessarily involved in the litigation. Unquestionably, the inherent inequalities involved in an apportionment in strict accordance with the State Constitution, raised in the record in this cause, have operated at least as a contributing deterrent to revisionary action. At the present time, it cannot be validly challenged that the appellant Senators wish to provide a long-delayed reapportionment and propose to do so when the confusion created by the 3-judge Court Decree is removed.

[11] See note 1, p. 2, this Response.

State Court,[12] effectively entrenching its decree against any reconciliation with the law of Oklahoma.

The foregoing considerations, therefore, leave remaining the sole question of whether the appellees can avoid apparently inevitable reversal of the 3-judge Court Decree by inducing this Court to dismiss the appeal on purely procedural grounds.

ISSUES RELATING TO DISMISSAL

Time of Appeal

The time element, in the taking of this appeal may be resolved quite summarily. For all practical purposes, the Interlocutory Decree filed on June 19, 1962,[13] together with the "Further Statement of Facts and Law on the Merits"[14] became an integral part of the Decree filed on August 3, 1962,[15] in that a timely Motion to Alter or Amend Decree was filed in relation to the June 19 Decree on June 29, 1962, and *specifically ordered, by the Court, taken under advisement*, and thereafter "overruled" on August 3, 1962, in the Decree entered on that date.[16] Notice of appeal was filed on August 31, 1962—less than the time allowed by Rules 10 and 11.[17]

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[12] It is quite true that Federal questions also were alleged in the petition in the State court, it being deemed necessary under the decisions of this Court. *Government & Civic Emp. Org. Com. CIO* v. *Windsor*, *supra*, n. 1; *Harrison* v. *N.A.A.C.P.*, *supra* (Op. January 14, 1963).

[13] Jurisdictional Statement, Appendix III, p. xxvii.

[14] *id.*, Appendix IV, p. xxix.

[15] *id.*, Appendix V, p. xli.

[16] *id.*, p. 9.

[17] Act of June 24, 1949, c. 646, 62 Stat. 961, 28 U.S.C. § 2101(a).

An examination of the Motion to Alter or Amend will disclose that it unquestionably was of sufficient substance to warrant its consideration by the Court; and the partial effective sustaining thereof by the Decree of August 3, 1962 (even though the Court, by semantic transposition, declared the motion to be "overruled") attests to its substantiality. Hence, that earlier Decree—explained and clarified as a part of the August 3 Decree, and thereby actually partially sustained—did not become appealable until the latter date.[18]

Substance of Decree

It is conceded that the "Interlocutory Decree" of June 19, subsequently clarified, *in itself* might possibly be unappealable to this Court, in that it does not contain language of express injunctive import. In fact, the last paragraph[19] states that the cause is "continued for the effectuation of appropriate relief and final judgment." But that "Interlocutory Decree," when finalized, was incorporated in the Decree of August 3, *supra*,[20] and became an integral portion of the latter.

Appellees seek to make capital of the fact that a "protective" appeal also has been taken to the Court of Appeals for the Tenth Circuit. But such fact is not, by any means, a retraction from our contention that the Decrees of August 3 are truly injunctive in nature and effect. The other appeal was lodged in furtherance of a most natural prudence to forestall the possibility that this Court possibly might not

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[18] *United States* v. *Crescent Amusement Co.*, 323 U.S. 173.

[19] Jurisdiction Statement, Appendix III, p. xxviii.

[20] See note 15, p. 5, this Response.

agree with the considerations hereinafter urged and that the indefensible actions of the 3-judge Court might thereby become *res judicata*. For, even should their natural bias of advocacy have led counsel for appellants to an erroneous conclusion as to the effective character of the Decrees, they remain unquestionably as declaratory of Oklahoma law and the relation of the Federal Constitution thereto. It further might be added that the Circuit Court has been requested to certify to this Court the questions here appealed, in order that in all events these issues of transcendental public import[21] may be resolved in this Court in a manner consonant to its holdings in the other related causes before it at the present Term.

The fundamental factor in determining the appealability to this Court of the Decree of the 3-judge Court is conceded by appellants to be the presence or absence of injunctive effect in their operation; but it is not conceded that any semantic label appended to them is conclusive of their ultimate nature.

It is axiomatic that a decree or judgment is to be classified by reference to its substance rather than either its form or its appellation.[22] And an examination of the Decrees, considered in the light of pertinent collateral considerations can leave no rational doubt as to their intended operative effect.

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[21] See *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U.S. 498, and cases cited.

[22] *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541, 546-547; *Feinberg* v. *Doe*, 14 Cal.2d 24, 92 P.2d 640, 642.

The language[23] "The Oklahoma Legislature *will be* reapportioned," "The House of Representatives of the Oklahoma Legislature *will be* reapportioned," "The Senate of the Oklahoma Legislature *will be* reapportioned" (in each case specifying the particular manner of so doing), and when the Legislature convenes, "*it must reapportion itself,*" are not mere pronouncements of exhortation. They are cast in the grammatical imperative mood.

It is to no avail that appellees urge that the appellant State Senators voluntarily intervened in the litigation. The ultimate fact remains that they *were* parties when the Decree of August 3 was rendered; and a further ultimate fact is that they, being the *only defendants* in the litigation capable of implementing the decretal command of the 3-judge Court, are directly subjected to its unequivocal mandate to act.

That the 3-judge Court stated, in connection with its order, one method by which it contemplated its enforcement if not obeyed did not dilute its authoritative purport. Equity does not enter a decree that binds no one and determines nothing.[24] And a court of equity is not limited to contempt proceedings to enforce its decrees.[25]

Cumulatively, the subsequent actions of the 3-judge Court furnish an even clearer index to its intentions in the August 3 Decree. Had it been intended merely to issue an

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[23] Jurisdictional Statement, Appendix V, pp. xli-xliv.

[24] *Electric Steel Foundry* v. *Huntley* (C.C. 9th), 32 F.2d 892.

[25] *Copeland* v. *Bennett*, Tex. Civ. App., 243 S.W.2d 264; *Baker* v. *Carr*, 369 U.S. 186.

interlocutory pronouncement of abstract law, unaccompanied by the symbols of inviolable command, it is logically inconceivable that it would have enjoined a resort to the Supreme Court of Oklahoma for construction of the law of the State, as indicated in the record of the appeal being docketed as abovementioned. The only possible conclusion consonant with rationality—and in vindication of an otherwise wholly indefensible abuse of discretion—is the interpretation offered by counsel for appellees in seeking that later injunction, i.e., that appellants were seeking to collaterally attack the positive judgment rendered by the 3-judge Court on August 3, thereby seeking to interfere with the enforcement by the latter of its mandatory decree.

Whether or not that constitutes sufficient cause for issuance of that subsequent injunction necessarily must await determination of the appeal from that order. But the fact of its issuance cannot fail to furnish probative evidence of the intention of the judges who promulgated the Decrees involved in this appeal.

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